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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 418

ALBERT AGUECI,

Defendant,

THE STUYVESANT INSURANCE COMPANY,

Surety on Bond—Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Stuyvesant Insurance Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case affirming a denial of the petitioner's motion to set aside a bail forfeiture by the United States District Court for the Southern District.

Opinion of the Courts Below

The opinion of the Court of Appeals affirming the denial of petitioner's motion to set aside the bail forfeiture and the opinion of the United States District Court for the Southern District of New York denying the motion to set aside the bail forfeiture are printed hereto, *infra.*

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was dated and entered June 26, 1967. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

Whether the District Court committed error in refusing to set aside the bail forfeiture.

Statute Involved

Rule 46 (F)(2)—Federal Rules of Criminal Procedure

Rule 46 Bail

(F) Forfeiture

(2) Setting Aside. The court may direct that a forfeiture be set aside upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

Statement of the Case

The defendant was indicted for alleged criminal activity in the Southern District of New York on September 11th, 1961. A bail bond in the sum of $20,000.00, was issued on behalf of the defendant (now deceased), Albert Agueci. On October 8th, 1961, Albert Agueci left his home in Toronto, Canada to appear in court and began his trip to New York City. By order of the Court he was commanded to be present in Court the morning of October 9th, 1961.

Agueci never appeared in court the morning of October 9th, 1961. His bail was forfeited and the trial of those indicted along with Agueci began on November 6th, 1961.

On November 23rd, 1961, Agueci's dead body was found in Monroe County, New York. The cause of death was ruled to be homicide (11a).[1] Although the approximate date of Agueci's death remained initially uncertain, later evidence tended to show that he was killed sometime after October 9th, 1961. Agueci's whereabouts, between his departure from Toronto and the approximate date of his death, was, and still is, unknown. At the hearing on the motion, evidence was presented which tended to prove that Agueci was forcibly detained during that time, however, no definite answers were available.

The testimony of Agueci's wife and child was to the effect that he had left Toronto on October 8th, 1961 with the full intention of appearing in court the following morning, October 9th, 1961 (6a-8a).

The affidavit of Frank Cutrona states that he had been a recent arrival to Canada in 1961 and that he and his wife were joint owners of a certain house located in Toronto, Canada. At the request of the defendant, he put his house up as a guarantee on the bond. He had known the defendant in Italy and had attended his wedding. Mr. Cutrona further states that he works as many as sixteen hours a day and that the equity he has in the said house is all that he and his wife own. The loss would cause undue suffering on his wife, his children and himself (12a-15a).

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1. Numbers in parentheses refer to the U.S. Circuit Court of Appeals Appendix.

The affidavit of Vita Agueci, the wife of the defendant, states that she sold her home in Toronto, Canada, so that she would be able to raise sufficient cash to meet the terms of the bail bond. In addition to advancing $10,000.00, she had to borrow approximately $2,000.00 from her friends for other expenses. These monies are still outstanding. She further states that she is anemic and is under the care of Dr. Delici, of Toronto, Canada. Mrs. Agueci further states that the Cutronas who were innocent bystanders, are in the position of losing their home. "This is unfair and harsh, since Mr. Cutrona did not receive any compensation for his favor to us" (6a-8a).

Dr. Greendyke, the medical examiner of Monroe County in the summary of his autopsy report states that the "autopsy revealed evidence of strangulation together with considerable burning of the body" (11a).

It is our contention that the defendant Albert Agueci, left his home on October 8th, 1961, with the express intention of going to New York City to appear in court. It is apparent that the defendant, Albert Agueci was kidnapped and held captive for a period of time preceding his murder, by reading the autopsy report and testimony of Doctor Greendyke which states that before the deceased (Albert Agueci) was burned his hands were tied together (35a-36a).

On June 27th, 1966, a hearing on the motion was held before the Hon. William B. Herlands. At the end of the hearing, decision was reserved and subsequently, the motion to vacate the bail forfeiture was denied (36a).

The United States Court of Appeals for the Second Circuit affirmed the denial of the motion to vacate the bail forfeiture (appendix hereto, *infra*). Pertinent details of the reasoning in the opinion of the Court of Appeals are noted *infra*.

REASONS FOR GRANTING THE WRIT

The Court below committed an error in refusing to set aside the bail forfeiture.

We respectfully urge that the respective positions taken by the courts below concerning this forfeiture present a major threat to the fair administration of federal criminal justice. The question presented in this petition has an immediate and far reaching influence far beyond the facts and parties involved in this case.

The United States Court of Appeals had the following to say about the forfeiture by the court below:

> "Recognizing these legitimate claims of hardship, the district court nevertheless decided that the public interest demanded forfeiture of the bond. The case against Agueci and several co-defendants was one of the most important narcotics prosecutions in years. Judge Herlands, who presided over the trial of the co-defendants after Agueci failed to appear, found that the evidence most convincingly established that Agueci had played a major role in an international narcotics ring and that his arrest and subsequent non-appearance were widely publicized. Under these circumstances, he ruled that 'the public interest and the specific necessity of effectuating the appearance of criminal defendants in large-scale narcotics cases outweigh the humanitarian appeal of the defendant's wife and daughters.'
>
> We hold that the district court properly exercised its discretion in denying the instant motion as its findings are supported by the record."

This opinion fails to consider fully the standard to be used in determining whether there should be a bail forfeiture.

Rule 46(f)(2) of the Federal Rules of Criminal Procedure provides that:

> "The court may direct that a forfeiture be set aside, upon such conditions as the Court may impose, if it appears that justice does not require the enforcement of the forfeiture."

The predecessor statute, 18 U.S.C.A., Section 601, provided in substance that a court might direct a remission if the default was not wilful, if a trial might nevertheless be had, and finally, if "public justice does not otherwise require the . . . penalty to be enforced."

A comparison of these two statutes clearly reveals a substantial liberalization and one which allows, and indeed requires, the courts to exercise a broader discretion in favor of aggrieved persons. The Advisory Committee on Rules has stated:

> "Subdivision (f)(2) changes existing law in that it increases the discretion of the court to set aside a forfeiture. The power of the court under 18 U.S.C.A. former Section 601 was limited to cases in which the defendants' default had not been wilful. 18 U.S.C.A., Section 46 (f)(2)."

It is respectfully submitted that the standard by which the court's decision below is to be measured is not the ordinary standard applicable to discretionary matters:

> "Whether a district court has erred in not setting aside a forfeiture is a matter to be determined by reference to the criterion the rule prescribes as the definitive measure—does justice require enforcement of the forfeiture? And, review for the purpose of determining whether the court's action represents the application of that criterion is not circumscribed

> by the considerations which apply to restrict the scope of review of the exercise of judicial discretion." *United States* v. *D'Argento,* 339 F. 2d 925, 927 (7th Cir. 1965).

It would be fastidious of counsel to fill these pages with anguished cries denouncing the court's decision below as "arbitrary and capricious" and without any basis in reason. Certainly, if this appeal were to hinge solely on the sufficiency of the proof offered with respect to the time of Albert Agueci's murder, to wit, that unequivocally he was killed before October 9th, 1961, then this appeal would be worthless. For surely, the testimony of Dr. Greendyke, the Monroe County Medical Examiner, dispels to a large degree the hypothesis that Albert Agueci was murdered before October 9th (34a-35a).

It is suggested that a proper decision in this case does not rest solely upon establishing the time of Albert Agueci's murder before the 9th of October, 1961. The testimony in that respect is largely uncontradicted, with the exception of Dr. Greendyke's letter to Mr. Rothblatt (12a). The testimony however, of Albert Agueci's wife and daughter was also uncontradicted. They both testified that their husband and father left his Toronto home on October 8th, 1961 and that he was going to New York to stand trial (15a-17a, 20a-21a).

Apparently, the district court below felt that if it believed the testimony of Dr. Greendyke, then irrespective of the credibility which it might attach to the testimony of Agueci's wife and daughter, it was forced to deny remission of the bail forfeiture. Apparently, the district court below felt that the only excuse available to the appellants

was the death of Albert Agueci before October 9th, and that the strong inference of kidnapping was not open to judicial consideration (35a-36a). It need only be mentioned that Albert Agueci's location for the month following October 8th, 1961, was and still is unexplained.

Counsel must respectfully contend that the district court below misapprehended the nature of the proofs required when a bail forfeiture is sought to be set aside. Rule 46(f)(2) speaks in terms of apparent facts; "if it *appears* that justice does not require the enforcement of the forfeiture." The plain language of the section places the burden on the Government. To require counsel below to prove with meager resources the exact whereabouts of Albert Agueci during the time he left Toronto on October 8th and the time he was murdered some three weeks later, would impose a far greater burden than Rule 46(f)(2) ever contemplated. Rather, it would appear to be the better construction of Rule 46(f)(2) to require the government in the face of the testimony offered by the Agueci women, to bring forward some evidence showing the justice of the Government's position. Was the trial delayed because of Agueci's absence? What expense was suffered? Was the case against Agueci's co-defendants markedly prejudicial because of Agueci's non-appearance? These are proper considerations in a case such as this which can be considered alike in determining whether a full or even partial remission should be allowed. Surely, Rule 46(f)(2) contemplates a wider range of circumstances than death as excluding the appearance of a defendant. Where as in this case, testimony has been given which points to the forcible detention of Albert Agueci, a court should conclude, as a matter of law, that sufficient justification has been present-

ed which would require the setting aside of the bail forfeiture. This result should certainly follow where there has been no prejudice to the Government.

It has been said that the first virtue of the law is justice and that the second is humanity. Counsel hopes that he has convincingly presented the justice of this case but would also like to briefly direct this court's honorable attention to the tragic situation which has been imposed on people whose innocence remains undoubted. Frank Cutrona, a long-time friend of the deceased, Albert Agueci, was requested by Agueci to put his home up as collateral security for the $20,000.00 bond in issue. Cutrona's home was worth at the time about $13,000.00. A $10,000.00 mortgage was procured. Cutrona now stands to lose this home because of the forfeiture herein. (See Affidavit of Frank Cutrona, Affidavit of Frank D. Nasso (2a-5a; 9a-10a).)

Mrs. Agueci and her family face a similar plight for they are responsible for the remaining portion of the bond. (See affidavit of Vita Agueci (6a-8a).)

Counsel does not contend that were these people wealthy a different result might be reached, but cites their circumstances to point out how unlikely it would have been—indeed, against human nature—for a man to leave a close friend and his own family in such destitute straits.

In conclusion, it is reiterated that the forfeiture of the bond in this case serves no useful judicial administrative purpose. It does not deter future conduct, for the fate of Albert Agueci is a far greater deterrent to those who would ignore orderly judicial processes. Furthermore, the Government has not shown the justice of *its* case, but has only tried to discredit the obvious justice of petitioner's position.

CONCLUSION

It is respectfully submitted that the issues raised, and problems presented, in this petition are of such major impact, as to warrant the favorable action of the Honorable Court and that sound reason exists for this Court noting jurisdiction and granting the writ sought.

Respectfully submitted,

HENRY B. ROTHBLATT
EMMA A. ROTHBLATT,
Attorneys for Petitioner

Of Counsel:
DONALD GRAJALES

APPENDIX I

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Cr. 527

UNITED STATES OF AMERICA,

Plaintiff,

—against—

ALBERT AGUECI,

Defendant,

THE STUYVESANT INSURANCE COMPANY,

Surety on Bond.

MEMORANDUM

HERLANDS, District Judge:

Defendant's surety has moved for an order setting aside the bail forfeiture herein "on the ground that justice does not require the enforcement thereof" (see Fed. R. Crim. P. 46(f)(2)). The bail had been ordered forfeited by this court on October 9, 1961. The present motion was brought on by notice of motion dated April 8, 1966 supported by affidavits sworn to on February 15 and 16, 1965. Judge Weinfeld had denied a prior application on November 1, 1965; and Judge Tyler had signed an order for the issu-

ance of a subpoena duces tecum on February 14, 1966 calling for the production of the medical reports of the Medical Examiner of Monroe County with respect to the death of the defendant Albert Aguecci.

This court has closely examined all of the prior proceedings and papers herein. This court was the trial judge who had ordered the forfeiture of the bail on October 9, 1961 and thereafter presided at the protracted trial of the defendants who appeared and stood trial. All of the defendants who stood trial were convicted; their conviction was affirmed by the Court of Appeals; and certiorari was denied by the Supreme Court. This court is intimately familiar with the entire trial record and pretrial proceedings.

In the interest of justice, an evidentiary hearing was held on June 27, 1966 in connection with the motion at bar. The movant was permitted to call without limitation any witnesses it saw fit. The movant produced on the stand, the widow of the deceased defendant, Mrs. Vita Agueci, and the daughter of the deceased, Miss Tommasa Agueci, age sixteeen years.

Mrs. Agueci and her daughter testified concerning the occasion on October 8, 1961 when defendant last spoke to and was seen by them. The gist of their testimony was that the defendant told his wife and daughter that he was going to New York to appear at the trial.

The Government called as its sole witness the Medical Examiner of Monroe County, Dr. Robert M. Greendyke, who testified in substance that, in his opinion (the Doctor's expertise was conceded by the movant) the defendant had been killed several days prior to the day when he was

found, November 23, 1961, with the outside possibility that he might have been dead for approximately two weeks prior to November 23, 1961. According to the Doctor's testimony, it appeared that the defendant's wrists had been bound by wire prior to the time he had been killed, although the wire was not connected when the body was discovered. The movant's attorney sought to prove that the defendant was a captive at the time of his death.

Giving maximum leeway to the Medical Examiner's estimate of the date of death, the defendant was killed anywhere between November 8 or 9 and November 20, 1961. As noted, the bail was ordered forfeited almost a month prior thereto, on October 9, 1961. Movant's attorney argues that an inference should be drawn retrospectively to the effect that, when the defendant did not appear in court on October 9, 1961, he was unable to do so because he was the victim of a kidnapping and that hence the circumstances bringing about the bail forfeiture were such as to warrant the exercise of the court's discretion to set aside the forfeiture under Rule 46(f)(2).

It may be noted that the movant did not offer any testimony concerning its efforts at any time or on after October 9, 1961 to locate the defendant or to ascertain the cause for his non-appearance. There is no evidence that the defendant's family reported his absence to the police, made any inquiries or took any steps to ascertain his whereabouts.

On the basis of the live testimony presented to this court at the hearing June 27, 1966, and on the basis of the entire record of the case, the court is of the firm and unqualified opinion that justice requires the enforcement of the for-

feiture. Without laboring the point, the court is of the opinion that Mrs. Agueci and her daughter did not testify credibly as to their alleged recollection as to the precise conversation on the specific day of October 8, 1961 with the defendant.

The case in chief was one of the most important narcotics prosecutions in recent years. The defendant Albert Agueci had obtained a reduction in his original bail and the bail that was forfeited was the reduced bail in the amount of $20,000. The evidence most convincingly established that he was an important part of a major international narcotics ring. The trial proceedings were widely publicized as was the fact of the defendant's bail forfeiture. There are important desiderata of public policy involved.

The court sympathizes with the plight of the defendant's family. In this, as in many other criminal cases, the family is an innocent victim. On balance, the public interest and the specific necessity of effectuating the appearance of criminal defendants in large-scale narcotics cases outweigh the humanitarian appeal of the defendant's wife and daughter.

Accordingly, the motion is denied. So ordered.

Dated: New York, N. Y.,
June 28, 1966.

WILLIAM B. HERLANDS,
U.S.D.J.

APPENDIX II

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 480—September Term, 1966

(Argued June 6, 1967 Decided June 26, 1967.)

Docket No. 30875

UNITED STATES OF AMERICA,

Plaintiff,

—against—

ALBERT AGUECI,

Defendant,

THE STUYVESANT INSURANCE COMPANY,
Surety on Bond,

Appellant.

Before:

MOORE, FRIENDLY and ANDERSON,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Hon. William B. Herlands, denying a motion to set aside a forfeiture of bail for the non-appearance of the defendant, Albert Agueci, at his trial. Affirmed.

HENRY B. ROTHBLATT, New York, N. Y. (Emma A. Rothblatt and Joel Winograd, both of New York, N. Y., on the brief), *for appellant.*

LAWRENCE W. SCHILLING, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., James G. Greilsheimer, Assistant United States Attorney, on the brief), *for appellee.*

PER CURIAM:

The Stuyvesant Insurance Company (Surety) appeals from an order of the district court denying a motion to set aside bail forfeiture. Albert Agueci was indicted in the Southern District of New York on September 11, 1961 on several counts of violating the federal narcotics laws. A bail bond in the sum of $20,000 was issued by Surety on behalf of Agueci guarantying his appearance in the district court on the morning of October 9, 1961. Agueci failed to appear and on October 9th the district court ordered forfeiture of bail. On April 8, 1966, Surety brought the instant motion before Judge Herlands, who had initially ordered forfeiture of bail, to set aside the forfeiture "on the ground that justice does not require the enforcement thereof." See Fed. R. Crim. Pro. 46(f)(2).[1] Judge Wein-

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[1] Rule 46(f)(2) provides:

'Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."

feld had denied a prior application for relief on November 1, 1965, without prejudice.

Judge Herlands held an evidentiary hearing on the instant motion at which Mrs. Vita Agueci and Miss Tommasa Agueci, Agueci's wife and daughter, respectively, testified that Agueci left their home in Toronto, Canada, on October 8, 1961, after telling them that he was going to New York to appear at this trial. They never saw him again as his murdered body was found in upstate New York on November 23, 1961. The Medical Examiner of Monroe County, New York, testified that Agueci probably had been killed several days prior to November 23rd with the outside possibility that he had been killed as much as two weeks before that date—still a month after Agueci left his home in Toronto.

Surety makes two arguments as to why bail should not have been forfeited in this case. It first contends that, as Agueci left Toronto with the apparent intention of going to New York and was later murdered, the logical inference is that he was kidnapped on his way to New York and his default was thus not voluntary. The district court rejected the kidnapping theory, finding that the testimony of Agueci's wife and daughter lacked credibility and noting that Surety had offered no evidence concerning its or Agueci's family's efforts to locate Agueci on or after October 9, 1961.

Surety also argues that the forfeiture of bail in this case works an undue hardship on innocent third parties. To obtain the bail bond, Agueci persuaded one Frank Cutrona to execute a $10,000 mortgage on his house as security for

the bond. Cutrona now stands to lose his house. Agueci's wife had guaranteed the remaining portion of the bond and apparently has had to sell her Toronto home to meet the bond's terms.

Recognizing these legitimate claims of hardship, the district court nevertheless decided that the public interest demanded forfeiture of the bond. The case against Agueci and several co-defendants was one of the most important narcotics prosecutions in years. Judge Herlands, who presided over the trial of the co-defendants after Agueci failed to appear, found that the evidence most convincingly established that Agueci had played a major role in an international narcotics ring and that his arrest and subsequent non-appearance were widely publicized. Under these circumstances, he ruled that "the public interest and the specific necessity of effectuating the appearance of criminal defendants in large-scale narcotics cases outweigh the humanitarian appeal of the defendant's wife and daughter."

We hold that the district court properly exercised its discretion in denying the instant motion as its findings are supported by the record.

Affirmed.

APPENDIX III

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of June one thousand nine hundred and sixty-seven.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ALBERT AGUECI,

Defendant,

STUYVESANT INSURANCE COMPANY,

Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix III—Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk